

§ 488.436, for a civil money penalty imposed per day, the State initiates collection of the penalty when the facility—

(i) Achieves substantial compliance; or (ii) Is terminated.

(2) If a facility waives, in writing, its right to a hearing as specified in § 488.436, the State initiates collection of civil money penalty imposed per instance of noncompliance upon receipt of the facility's notification.

(d) Accrual and computation of penalties for a facility that—

(1) Requests a hearing or does not request a hearing are specified in § 488.440;

(2) Waives its right to a hearing in writing, are specified in §§ 488.436(b) and 488.440.

[59 FR 56243, Nov. 10, 1994; 60 FR 50119, Sept. 28, 1995, as amended at 64 FR 13360, Mar. 18, 1999; 76 FR 15127, Mar. 18, 2011]

§ 488.433 Civil money penalties: Uses and approval of civil money penalties imposed by CMS.

Ten percent of the collected civil money penalty funds that are required to be held in escrow pursuant to § 488.431 and that remain after a final administrative decision will be deposited with the Department of the Treasury in accordance with § 488.442(f). The remaining ninety percent of the collected civil money penalty funds that are required to be held in escrow and that remain after a final administrative decision may not be used for survey and certification operations but must be used entirely for activities that protect or improve the quality of care for residents. These activities must be approved by CMS and may include, but are not limited to:

(a) Support and protection of residents of a facility that closes (voluntarily or involuntarily).

(b) Time-limited expenses incurred in the process of relocating residents to home and community-based settings or another facility when a facility is closed (voluntarily or involuntarily) or downsized pursuant to an agreement with the State Medicaid agency.

(c) Projects that support resident and family councils and other consumer involvement in assuring quality care in facilities.

(d) Facility improvement initiatives approved by CMS, such as joint training of facility staff and surveyors or technical assistance for facilities implementing quality assurance and performance improvement program, when such facilities have been cited by CMS for deficiencies in the applicable requirements.

(e) Development and maintenance of temporary management or receivership capability such as but not limited to, recruitment, training, retention or other system infrastructure expenses. However, as specified in § 488.415(c), a temporary manager's salary must be paid by the facility.

[76 FR 15127, Mar. 18, 2011]

§ 488.434 Civil money penalties: Notice of penalty.

(a) *CMS notice of penalty.* (1) CMS sends a written notice of the penalty to the facility for all facilities except non-State operated NFs when the State is imposing the penalty.

(2) *Content of notice.* The notice that CMS sends includes—

(i) The nature of the noncompliance;

(ii) The statutory basis for the penalty;

(iii) The amount of penalty per day of noncompliance or the amount of the penalty per instance of noncompliance;

(iv) Any factors specified in § 488.438(f) that were considered when determining the amount of the penalty;

(v) The date of the instance of noncompliance or the date on which the penalty begins to accrue;

(vi) When the penalty stops accruing, if applicable;

(vii) When the penalty is collected; and

(viii) Instructions for responding to the notice, including a statement of the facility's right to a hearing, and the implication of waiving a hearing, as provided in § 488.436.

(b) *State notice of penalty.* (1) The State must notify the facility in accordance with State procedures for all non-State operated NFs when the State takes the action.

(2) The State's notice must—

(i) Be in writing; and

§ 488.436

42 CFR Ch. IV (10–1–12 Edition)

(ii) Include, at a minimum, the information specified in paragraph (a)(2) of this section.

[59 FR 56243, Nov. 10, 1994; 60 FR 50119, Sept. 28, 1995, as amended at 64 FR 13360, Mar. 18, 1999]

§ 488.436 Civil money penalties: Waiver of hearing, reduction of penalty amount.

(a) *Waiver of a hearing.* The facility may waive the right to a hearing, in writing, within 60 days from the date of the notice imposing the civil money penalty.

(b) *Reduction of penalty amount.* (1) If the facility waives its right to a hearing in accordance with the procedures specified in paragraph (a) of this section, CMS or the State reduces the civil money penalty by 35 percent, as long as the civil money penalty has not also been reduced by 50 percent under § 488.438.

(2) If the facility does not waive its right to a hearing in accordance with the procedures specified in paragraph (a) of this section, the civil money penalty is not reduced by 35 percent.

[59 FR 56243, Nov. 10, 1994; 62 FR 44221, Aug. 20, 1997; 76 FR 15127, Mar. 18, 2011]

§ 488.438 Civil money penalties: Amount of penalty.

(a) *Amount of penalty.* (1) The penalties are within the following ranges, set at \$50 increments:

(i) *Upper range—\$3,050–\$10,000.* Penalties in the range of \$3,050–\$10,000 per day are imposed for deficiencies constituting immediate jeopardy, and as specified in paragraph (d)(2) of this section.

(ii) *Lower range—\$50–\$3,000.* Penalties in the range of \$50–\$3,000 per day are imposed for deficiencies that do not constitute immediate jeopardy, but either caused actual harm, or caused no actual harm, but have the potential for more than minimal harm.

(2) *Per instance penalty.* When penalties are imposed for an instance of noncompliance, the penalties will be in the range of \$1,000–\$10,000 per instance.

(b) *Basis for penalty amount.* The amount of penalty is based on CMS's or the State's assessment of factors listed in paragraph (f) of this section.

(c) *Decreased penalty amounts.* (1) Except as specified in paragraph (d)(2) of this section, if immediate jeopardy is removed, but the noncompliance continues, CMS or the State will shift the penalty amount imposed per day to the lower range.

(2) When CMS determines that a SNF, dually-participating SNF/NF, or NF-only facility subject to a civil money penalty imposed by CMS self-reports and promptly corrects the noncompliance for which the civil money penalty was imposed, CMS will reduce the amount of the penalty by 50 percent, provided that all of the following apply —

(i) The facility self-reported the noncompliance to CMS or the State before it was identified by CMS or the State and before it was reported to CMS or the State by means of a complaint lodged by a person other than an official representative of the nursing home;

(ii) Correction of the self-reported noncompliance occurred on whichever of the following occurs first:

(A) 15 calendar days from the date of the circumstance or incident that later resulted in a finding of noncompliance; or

(B) 10 calendar days from the date the civil money penalty was imposed;

(iii) The facility waives its right to a hearing under § 488.436;

(iv) The noncompliance that was self-reported and corrected did not constitute a pattern of harm, widespread harm, immediate jeopardy, or result in the death of a resident;

(v) The civil money penalty was not imposed for a repeated deficiency, as defined in paragraph (d)(3) of this section, that was the basis of a civil money penalty that previously received a reduction under this section; and

(vi) The facility has met mandatory reporting requirements for the incident or circumstance upon which the civil money penalty is based, as required by Federal and State law.

(3) Under no circumstances will a facility receive both the 50 percent civil money penalty reduction for self-reporting and correcting under this section and the 35 percent civil money